In the

Supreme Court of the United States.

OCTOBER TERM, 1949.

No.

CHARLES McGARTY, PETITIONER,

v.

JOHN J. O'BRIEN,

WARDEN OF THE MASSACHUSETTS STATE PRISON,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices Thereof:

The petitioner, Charles McGarty, respectfully requests that a writ of Certiorari may issue to review the judgment of the United States Court of Appeals for the First Circuit in the case of *Charles McGarty* v. *John J. O'Brien, Warden of Massachusetts State Prison,* decision rendered March 27, 1950, which affirmed the judgment of the District Court entered July 26, 1949, reported on pages 31-35, in the Record, and at 85 Federal Supplement, 415-417.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1), and is being filed within the time allowed by the Court from March 27, 1950, the date of entry of the judgment of the Court of Appeals as required by law.

THE QUESTIONS PRESENTED.

1) The principal question presented in this case is whether the petitioner exhausted his available remedies in the State Court before he resorted to the Federal District Court by way of petition for writ of Habeas Corpus charging petitioner was confined without due process of law because of failure to employ psychiatrists.

2) Whether the failure on the part of the State, on motion of the petitioner, to supply funds to hire competent medical assistance to aid him in his defense violates a principle of justice as to be ranked as fundamental.

STATEMENT OF FACTS.

The essential facts of the case as set out in the Record are as follows:

Charles McGarty of Fall River, Massachusetts was indicted in the February, 1948 term of the Grand Jury for Bristol County, Massachusetts for the crime of murder in the first degree; that thereafter trial was had before Hurley, J. and a jury in the Superior Court for said County, and that the petitioner was found guilty of murder in the first degree, and was sentenced to die in the electric chair.

The record further reveals that in good time, and prior to the impanelling of a jury, the petitioner moved through his counsel who was appointed by the Court to defend him, an indigent person without funds, that he be allowed to engage medical experts at the expense of the Commonwealth to examine him on the question of his mental responsibility at the time of the commission of the alleged offense. The motion asked that an allowance be made for expenses for the employment of psychiatrists to aid him in his defense, and to testify as experts at his trial. This motion was denied by Hurley, J., and an exception was duly noted.

After the conviction and sentence, the petitioner duly

appealed to the Supreme Judicial Court for the Commonwealth of Massachusetts, and in said Court the question was raised whether the defendant had not been deprived of his rights under the Federal Constitution, because of the denial of the Superior Court of this motion for the employment of expert witnesses.

RULINGS AND ORDER OF DISTRICT COURT.

The opinion and the order of the District Court (Ford, J.) on July 26, 1949, are set forth at pages 31-35 of the Record.

From this order the petitioner appealed to the United States Court of Appeals for the First Circuit (see Record, page 36), and the opinion of the United States Court of Appeals for the First Circuit is set forth on pages 40-46 of original Record.

STATEMENT OF POINTS.

Relied upon by the petitioner and appealed to the United States Court of Appeals for the First Circuit, filed October 25, 1949:

1. The denial by the District Court of the petition for writ of Habeas Corpus on the ground that the petitioner had failed to exhaust his state court remedies. Your petitioner, defendant in the State Court, specifically made this federal claim in his brief to the Massachusetts Supreme Court.
2. The petitioner is entitled to review upon the question whether the refusal of the State Court to allow his motion to engage medical experts at the expense of the Commonwealth to examine him impartially on the question of his mental responsibility at the time of the commission of the alleged offense, was error, in that the refusal was a denial of due process within

the meaning of the Fourteenth Amendment to the Federal Constitution.

That it does, appears to come within the type of case referred to in *Betts* v. *Brady,* 316 U.S. 455.

3. The petitioner had the choice between applying directly to the Supreme Court of the United States for a review of the Constitutional issue by certiorari, or instituting an original Habeas Corpus proceeding in a Federal District Court and his choice of the latter was not error. *Wade* v. *Mayo,* 334 U.S. 672.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully represents that this petition should be granted for the reason that the Court of Appeals has rendered a decision involving an important question of federal law in a way probably in conflict with applicable decisions of this Court.

PRAYER FOR WRIT.

Wherefore, your petitioner, by his undersigned counsel, respectfully prays that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the First Circuit, commanding that court to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and also pleadings in the case entitled *Charles McGarty, Petitioner-Appellant* v. *John J. O'Brien, Warden of Massachusetts State Prison, Respondent-Appellee,* being designated and numbered on its Docket October Term 1949, No. 4458, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court, to the end that your petitioners may have the relief therein prayed for and such

other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

CHARLES McGARTY,
by his Attorney,
WILLIAM C. CROSSLEY.

JAMES SELIGMAN,
WILLIAM H. LEWIS, JR.,
of Counsel.

CERTIFICATE.

I hereby certify that James Seligman, William H. Lewis, Jr., and I are counsel for the petitioner herein, Charles McGarty; that in accordance with the request of said petitioner the within Petition has been presented; that the allegations contained in said Petition are true, to the best of my knowledge and belief; and that said Petition is, in my opinion, well founded in law and in fact and should be granted.

WILLIAM C. CROSSLEY.

Commonwealth of Massachusetts
County of Suffolk, ss. Boston, October 1949.

Then personally appeared William C. Crossley of Fall River, Massachusetts, and made oath that he caused the foregoing Petition to be prepared with the consent of and in accordance with the request of petitioner named therein and that the allegations contained in said Petition are true to the best of his knowledge and belief. Before me,

Gladys E. Millward,
Notary Public.

My commission expires August 9, 1951.

BRIEF IN SUPPORT OF PETITION.

Certiorari was not petitioned for in this case because of the rule in the case of *Ex Parte Hawk*, 321 U.S. 114, and *Wade* v. *Mayo*, cited below.

The District Court, in dismissing the petition for a writ of Habeas Corpus, did not adjudicate the merits of this constitutional claim, but took the ground that petitioner had not exhausted his remedies under state law. The United States Court of Appeals for the First Circuit similarly did not reach the merits and affirmed the order of the District Court solely on the ground that the petitioner had not exhausted his remedies under the state law.

It is expressly provided in 28 U.S.C. Sec. 2254 that if there is still an available State procedure under which the constitutional claim presented by the petitioner may be pressed, he, the petitioner, must do this before seeking to vindicate the question in a Federal court, and it is agreed that the petitioner must exhaust at least one available remedy in the State court before he can resort to a Federal court.

Wade v. *Mayo*, 334 U.S. 672, 678.
Mooney v. *Holohan*, 294 U.S. 103, 113.

The petitioner in his brief before the Massachusetts Supreme Judicial Court stated that a denial of his motion by the lower court judge deprived him of his constitutional rights and in this way the federal question was set up in the State court for consideration.

The only available remedy which your petitioner, appellant, had before the Massachusetts Supreme Court was his original appeal to that Court setting forth his exception to the denial of his motion for medical experts and the record discloses that in his brief the petitioner, appellant stated that the gravity of the facts and circumstances "warranted

an authorization for employment of medical experts to the end that all of his *CONSTITUTIONAL RIGHTS* be safeguarded."

See Transcript of Record, pages 27, 28.

This would indicate that the State courts, which are in duty bound in any event to give full effect to Federal Constitutional rights, had their attention *specifically* drawn to this issue in the appellant's brief. Under the circumstances, the Commonwealth of Massachusetts offers no other effective procedure by which the question, once having been reviewed by its Supreme Court and acted upon, could be further reviewed. Certainly, where, as in Massachusetts, a writ of error lies only for error apparent on the face of the Record, no possibility exists that any effective result could come by this remedy and any application for a recall of the rescript in this case would be futile.

It would therefore appear, that the possibility of securing further effective determination on the merits of this question were substantially foreclosed beyond all probability, and indeed there exists the all but mathematical certainty that the case would go off on the procedural ruling that the matter had been reviewed and no further remedy was available in the Massachusetts State courts. It has been held in the case of *Marino* v. *Ragen*, 332 U.S. 561 that,

> "it would be nothing less than abdication of our constitutional duty and function to rebuff the Petitioner, Appellant, with this mechanical formula whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief."

Beyond any question, it would appear that the petitioner, appellant, had no substantial further hope of relief in the State courts of Massachusetts.

On the question whether the petitioner should have applied to the Supreme Court of the United States to review the constitutional issue by certiorari or by instituting an original habeas corpus petition in a District Court, your petitioner was governed by the implied deviation, from what appears to be the established rule, as laid down in the *Wade* case (cited above). Neither the District Court nor the Circuit Court, in their orders or decisions, relied on the petitioner's failure to seek certiorari, as the basis for their decisions.

This case was commenced in the District Court and appealed to the Circuit Court before the decision announced April 3, 1950 in the matter of *Pete Darr, Petitioner,* v. *C. P. Burford,* Warden and from the language which appeared so specific in the *Wade* case he assumed that he could institute proceedings in the District Court. If the procedure that he has undertaken to have the constitutional question decided, is now decided to be an erroneous one it might well mean that his ability to proceed further is probably forfeited.

CONCLUSION.

Your petitioner respectfully submits that this Honorable Court should grant Certiorari in this case.

Respectfully submitted,

WILLIAM C. CROSSLEY,
Attorney for Petitioner.

JAMES SELIGMAN,
WILLIAM H. LEWIS, JR.,
of Counsel.